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**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

★ JUL 19 2012 ★

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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AMAURY ROSARIO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.  
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**BROOKLYN OFFICE**

12-CV-3432 (ARR)

NOT FOR ELECTRONIC  
OR PRINT PUBLICATION

MEMORANDUM AND  
ORDER

ROSS, United States District Judge:

Amaury Rosario ("petitioner"), proceeding pro se, filed the instant motion to challenge his conviction and sentence, entered by this court on June 29, 2001. He asserts that he is entitled to resentencing on the basis of a new rule of law articulated in Miller v. Alabama, 132 S. Ct. 2455 (2012) (holding that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment). Because petitioner has already challenged his conviction pursuant to 28 U.S.C. § 2255 ("§ 2255"), this court cannot consider the instant motion and transfers it to the United States Court of Appeals for the Second Circuit ("Second Circuit").<sup>1</sup>

A jury found petitioner guilty of conspiracy to commit robbery and attempted robbery in violation of 18 U.S.C. § 1951, use of a firearm in relation to crimes of violence in violation of 18 U.S.C. § 924(c)(1), and four counts of murder through use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(j)(1). He was sentenced to life imprisonment, and judgment and sentence were entered on June 29, 2001. See United States v. Rosario, 99-CR-533

<sup>1</sup> Petitioner utilizes the form for an "Order Authorizing District Court to Consider Second or Successive Application," but addresses the form to this court instead of the Second Circuit.

(ARR). Petitioner appealed his conviction to the Second Circuit, which affirmed on October 9, 2002. United States v. Rosario, 48 Fed. Appx. 12 (2d Cir. 2002). He filed a petition for certiorari in the United States Supreme Court, which denied the petition on February 24, 2003. Rosario v. United States, 537 U.S. 1217 (2003). On February 19, 2004, petitioner filed a motion to vacate his conviction and sentence pursuant to § 2255, which this court denied by order dated March 6, 2006. Rosario v. United States, No. 04-CV-688 (ARR), Dkt. No. 24. Petitioner filed the instant motion on July 9, 2012.

Title 28, Section 2255 of the United States Code permits a prisoner in federal custody to challenge his sentence on the ground, inter alia, that it was imposed in violation of the United States Constitution. The law contains several gatekeeping provisions, including strict requirements for bringing successive petitions:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). Under the terms of this provision, only a court of appeals, and not a district court, may determine whether a second or successive petition “presents a claim not previously raised that is sufficient to meet § 2244(b)(2)’s new-rule or actual-innocence provisions.”

Gonzalez v. Crosby, 545 U.S. 524, 530 (2005).

Accordingly, in the interest of justice, the Clerk of Court shall transfer this petition to the Second Circuit pursuant to 28 U.S.C. § 1631. Liriano v. United States, 95 F.3d 119, 121-23 (2d Cir. 1996) (per curiam). This order closes this case. If the Second Circuit authorizes petitioner

to proceed in this matter, petitioner shall move to reopen under this docket number.

SO ORDERED.

S/Judge Ross

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Allyne R. Ross  
United States District Judge

Dated: July 19, 2012  
Brooklyn, New York

SERVICE LIST:

**Petitioner:**

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